in the *Clydebank* case had put forward, "what would one torpedo-boat do for that purpose," but that argument did not find favour with their Lordships.

As I have said, the substantial question in this case is whether the stipulated sum is a penalty or otherwise. That is a question of law. I have determined that question of law. If I were to hear this case at the proper hearing it would require no further evidence and no further argument. All that is necessary to decide is already included in the present application. There is no serious question of law involved. (See *Gore* v. *Gore* [4]).

In the circumstances I allow the application with costs.

Application allowed.

Solicitors: *Donaldson & Burkinshaw.*

ANTHONY READ v. HENRY ONG

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Pike C.J. (Borneo)) December 21, 1966]

[Kuching — Federal Court Civil Appeal No. X. 37 of 1966]

Contract — Person excluded by Committee of a Turf Club — Person buying ticket for entry into premises — Whether he has a legal right to enter the premises.

The appellant brought an action for damages for injury to his good name and reputation by reason of the respondent causing him to be wrongfully evicted by the police from the public enclosure of the Sarawak Turf Club. The committee of the club had made an order excluding the appellant from the premises under its control. The appellant however bought a ticket and entered the premises. After a report to the police, the appellant was asked by the police to leave and he did so.

Held: (1) the committee had a discretion to exclude any person from its premises;

(2) as the appellant had not disclosed his identity when he purchased the ticket, no valid contract was formed and the appellant was a trespasser;

(3) the removal of the appellant was not effected either by the respondent or by the Turf Club.

Cases referred to:—

(1) *Said* v. *Butt* [1920] 3 K.B. 497.

(2) *Sowler* v. *Potter & Ors.* [1939] 4 All E.R. 478.

FEDERAL COURT.

A. J. Braga for the appellant.

Stephen Yong for the respondent.

Pike C.J. (Borneo): This is an appeal against the decision of the High Court in Borneo dismissing with costs the appellant's action against the respondent for damages for injury to the appellant's good name and reputation, by reason of the respondent causing him to be wrongfully evicted by the police from the public enclosure of the Sarawak Turf Club on 13th February, 1965.

The respondent was sued as secretary of the Sarawak Turf Club and it was alleged that in that capacity he caused the appellant to be evicted from the public enclosure of the club. It was argued before us that the action was in fact against the respondent in a representative capacity, that is to say, as representing the Sarawak Turf Club. In support of this contention, appellant's advocate sought to refer to the Societies Act, 1966. This statute, however, had not yet come into force at the time when the eviction complained of occurred, and the governing statute was the Societies Ordinance (Cap. 107, Laws of Sarawak). No evidence whatever was given that the respondent, as secretary of the turf club, was the member of the club declared and registered under section 28(c) of the Societies Ordinance as the proper officer to sue or be sued as representative of the society. In my opinion, therefore, the action is to be regarded as an action against the respondent personally in his capacity as secretary of the turf club and is in no sense an action against the turf club itself.

The main grounds of appeal upon which the appellant relies are that the learned trial judge erred —

(a) in holding that the letter, Exhibit P.3, excluded the appellant from entering the public enclosure of the Sarawak Turf Club as an ordinary paying member of the public; and

(b) in not holding that the appellant's eviction was caused by the respondent or the Sarawak Turf Club.

The facts of the case as they appear from the record are that the appellant was until 1961 a member of the Sarawak Turf Club and until 1962 a trainer of race-horses. In 1963 he imported a race-horse into Sarawak. This horse was required by the turf club to submit to what is known as a barrier test and subsequent to this test the horse died. The appellant considered the turf club responsible for the death of his horse by reason of having required it to undergo the barrier test too soon after its arrival and before it had recovered from the sea journey and had had time to become acclimatised. The appellant communicated this to the turf club in a letter claiming $3,000 damages and threatening legal action if this sum was not paid within seven days. The turf club rejected this claim and also addressed a letter to the appellant informing him that the committee had directed that he be excluded from the premises of the turf club and intimating that if he was present in any part of the club's premises he would be deemed a trespasser. This is the letter known as Exhibit P.3. The appellant at this time was also a racing correspondent of the newspaper known as *"The Vanguard"* and wrote

therein under the name of "Klondike". His newspaper had given to him a badge issued to it by the turf club entitling him to free admission to the turf club. There is, however, no evidence that the turf club or the respondent was aware that the appellant was a racing correspondent for *"The Vanguard"* or any other newspaper nor did the appellant seek to gain admittance to the turf club on the day in question by means of this badge.

The appellant's case is that the letter, P.3, did not and could not exclude him in his capacity as a member of the public and that like any other member of the public he had a right on paying the entrance fee to enter and remain in the public enclosure of the turf club notwithstanding the letter P.3.

The appellant could not have been in any doubt that P.3 was intended to exclude him as a member of the public because such an exclusion could only apply to him in that capacity as he had ceased to be a member of the club after 1961, ceased to be a trainer of race-horses after 1962 and there was no evidence that the turf club was aware that he was a racing correspondent of *"The Vanguard"*. In its terms the exclusion was unlimited and specifically made applicable to every part of the club's premises. The appellant argued, however, that the committee of the club had no power under the Rules of Racing (under which they purported to act), and in particular rule 4, to exclude a member of the public. Rule 4 reads as follows:—

"The committee may exclude at its discretion any person or animal from the premises under its control."

I can find nothing in this rule that requires that it be construed in the restricted manner contended for by the appellant, nor does it seem to me to be unreasonably wide in scope. So to hold would result in the committee having no power to exclude a member of the public who arrived at the entrance gate clearly suffering from a highly infectious disease. Nor does it seem to me that the rule was intended to be limited only to animals belonging to members of the club since equally the committee must have the power to exclude a diseased animal from entering its premises irrespective of the ownership of that animal. I would therefore hold that the rule gave the committee full power to exclude any specified member of the public from its premises. I would go further and say that quite apart from this rule the committee would have a legal right to exclude any specified person (save a member in good standing) from the premises of the club. In my opinion it is well within the rights of the owner of property who holds out an invitation to the public at large to enter his premises for a particular purpose to exclude from that invitation any particular specified person.

The appellant contends that he was lawfully on the premises by reason of the fact that he had paid the required entrance fee and obtained an admission ticket. He further claimed that he could only lawfully be removed before the end of the day's racing if he so misconducted himself as to justify his removal. This argument clearly implies that the purchasing of a ticket resulted in a contract between the club and the appellant which entitled the appellant to enter and be on its premises. If in the making of this contract the identity of the person with whom it was being made was immaterial, this argument would be sound. But it is clear that having regard to the letter, P.3, the turf club would not, had it been aware of the identity of the person to whom the ticket was sold, have entered into any such contract. This was specifically stated by the witness Ee Ghim Yam in cross-examination. It is equally clear on the evidence that the appellant did not disclose his identity when buying the ticket of admission. Following the decisions in *Said* v. *Butt* [1] and *Sowler* v. *Potter & Ors.* [2] I am of the opinion that no valid contract was formed and that the appellant entered the public enclosure of the turf club without legal right and was therefore a trespasser. The appellant being then a trespasser, the respondent would as a servant of the turf club have been entitled to cause him, the appellant, to be removed and this removal would not give rise to any action at law unless it was accompanied by more force than was needed. It is clear that no force whatever was used. The appellant was told by a police officer that he had instructions to persuade him to leave and upon the appellant enquiring what it was all about he was told by the police officer that if he was not satisfied he could acompany the police officer to the police station to see his superior officer. This, according to the police officer, was precisely what the appellant did and the learned trial judge so found and was in my view fully justified in his finding.

The only question remaining, which in view of the opinions I have expressed above is in my view no longer material, is whether the appellant's removal can be said to have been effected either by the respondent or by the turf club. If it were necessary to express any opinion on this I would hold that his removal was not effected or caused either by the respondent or by the turf club. The evidence on this matter is that a copy of the letter P.3 was sent to the Superintendent of Police, Kuching, and subsequently on the day on which the appellant was illegally in the public enclosure of the turf club a telephone call from the turf club informed the police of the appellant's presence. The police do not normally act as the agent of a private concern in matters of this sort. The decision of the police to take action is one solely within their discretion and there is no

satisfactory evidence indicating whether that decision was merely to perform an act of eviction on behalf of the turf club and which the turf club by its own servants could lawfully have done, or whether the decision was prompted by a desire to prevent a possible breach of the peace which might occur if servants of the turf club themselves evicted him.

The letter P.3 was sent over the signature of the respondent but the order of exclusion which it communicated was the act of the committee of the turf club not of the respondent. The learned judge found, and there was evidence on which his finding is justifiable, that the telephone call which was the proximate cause of the visit of the police to the public enclosure of the turf club was not made by the respondent. If the respondent did not make that call then in my view any semblance of a case against him falls to the ground.

In the absence of evidence as to the reasons which led to the decision of the police to take steps to remove the appellant from the turf club premises there is insufficient evidence in my opinion to find, even assuming the turf club could be regarded as sued through its secretary, that the turf club caused the appellant's removal.

For the reasons which I have already set out, I would dismiss this appeal with costs.

Barakbah L.P.: I have had the advantage of reading the judgment of Pike C.J. Borneo. I agree with everything he has said and have nothing to add.

Azmi C.J. (Malaya): I have had the opportunity of reading the judgment of the Chief Justice, Borneo and I agree that the appeal be dismissed with costs for reasons given there.

Appeal dismissed.

MUNUSAMY v. PUBLIC SERVICES COMMISSION

[P.C. (Lord Morris of Borth-y-Gest, Lord Hodson & Lord Wilberforce) July 12, 1966]

[Privy Council Appeal No. 50 of 1964]

Constitutional Law — Public services — Restriction on dismissal and reduction in rank — Position of probationer — Reversion not amounting to reduction in rank — Constitution of Malaysia, arts. 132(1) & 135(2), (3).

Article 135(2) of the Constitution of Malaysia provides that no member of the general public service "shall be dismissed or reduced in rank without being given an opportunity to be heard."

The appellant who had previously been employed as an immigration officer was appointed assistant passport officer in the External Affairs Service on his acceptance of the terms of a letter which stated *inter alia* that ". . . the appointment will extend for a period of three years in the first instance. . . . You will be required to serve a probationary period of one year from the date of your appointment and subject to your work and conduct being satisfactory you will be eligible for confirmation in your appointment at the end of this period." One of the conditions laid down in the advertisement for applications was that candidates should have passed the school certificate examination. The appellant did not have the requisite school certificate but he stated in his application that he had passed that examination, and when that was discovered the respondent commission, without giving the appellant the opportunity of being heard, terminated his appointment during the probationary year and reverted him to his former post. The appellant applied, *inter alia*, for an order of *certiorari* to quash the commission's decision on the ground that under the Constitution his employment could not be terminated without giving him an opportunity of being heard. Ong Hock Thye J., as he then was, dismissed the application ([1960] M.L.J. 221) and the Federal Court upheld his decision ([1964] M.L.J. 239). On appeal to the Privy Council,

Held: (1) article 135(2) of the Constitution was concerned with the right to be heard in respect of disciplinary offences and applied only when dismissal or reduction in rank was inflicted in circumstances involving the imposition of a punishment or penalty. Penal consequences or punishment existed if an order for the reduction of rank of a member of a public service entailed or provided for forfeiture of pay or allowances, loss of seniority in substantive rank, or the stoppage or postponement of his future chances of promotion. In this case there has been no reduction of rank enabling the appellant to rely on the provisions of article 135(2) and so obtain a hearing for the reason that the action of the respondent could not be characterised as being by way of punishment;

(2) the appellant was in any event appointed to the rank of assistant passport officer only as a probationer so that he could be reverted to his substantive rank of immigration officer without the question of reduction of rank arising for consideration notwithstanding the statement in the letter that subject to his work and conduct being satisfactory he would be eligible for confirmation in his appointment at the end of the period. "Eligible for" is not equivalent to "entitled to" and means no more than "fit to be chosen for."

Cases referred to:—

(1) *High Commissioner for India & High Commissioner for Pakistan* v. *Lall* (1948), 75 I.A. 225, 237.

(2) *Parshotam Lal Dhingra* v. *Union of India* [1958] S.C.R. 828.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Satish Chandra Anand* v. *Union of India* [1953] S.C.R. 655; *State of Bihar* v. *Gopi Kishore*, A.I.R. 1960 S.C. 689; *Shyam Lal v. State of Uttar Pradesh*, [1955] S.C.R. 26; *State of Orissa* v. *Ram Narayan Das*, A.I.R. 1961 S.C. 177; *Sukhbans Singh* v. *State of Punjab*, A.I.R. 1962 S.C. 1711; *Gopal* v. *State of Punjab*, A.I.R. 1963 S.C. 531; *Banerjee* v. *Union of India*, A.I.R. 1963 S.C. 1552; *Jagdish Mitter* v. *Union of India*, A.I.R. 1964 S.C. 449; *Champaklal Chimanlal* v. *Union of India*, A.I.R. 1964 S.C. 1854; *McLelland* v. *New Zealand Health Board*, [1957] 2 All E.R. 129.

PRIVY COUNCIL APPEAL.

E. F. N. Gratiaen Q.C. and *Walter Jayawardena* for the appellant.

Lord Bledisloe Q.C. and *P. G. Clough* for the respondent.

The judgment of their Lordships was delivered by,